

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matters of)	
)	
International Comparison and)	GN Docket No. 09-47
Survey Requirements in the)	
Broadband Data Improvement Act)	
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Inquiry Concerning the Deployment of Advanced)	GN Docket No. 09-137
Telecommunications Capability to All Americans)	
in a Reasonable and Timely Fashion, and Possible)	
Steps to Accelerate Such Deployment Pursuant to)	
Section 706 of the Telecommunications Act of)	
1996, as Amended by the Broadband Data)	
Improvement Act)	

**COMMENTS OF THE FIBER-TO-THE-HOME COUNCIL
NBP PUBLIC NOTICE #7**

The Fiber-to-the-Home Council ("FTTH Council"),¹ through its undersigned counsel, hereby respectfully submits its comments to the Federal Communications Commission

¹ The FTTH Council is a non-profit organization established in 2001. Its mission is to educate the public and government officials about fiber-to-the-home ("FTTH") and to promote and accelerate FTTH deployment and the resulting quality of life enhancements FTTH networks make possible. The FTTH Council's members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities, and municipalities. As of today, the FTTH Council has more than 210 entities as members. A complete list of FTTH Council members can be found on the organization's website: <http://www.ftthcouncil.org>.

(“Commission”) in response to NBP Public Notice #7 (“*Commission Notice*”)² issued in the above-captioned proceedings.³

For over 100 years, municipal entities have built and operated communications infrastructure. Today, more than 600 public power systems offer broadband services, and, of the over 600 communities with FTTH, it is noteworthy that approximately 10 percent, including many of the largest systems in the United States, are operated by municipal entities.⁴ These entities serve over 3 percent of the FTTH subscribers in the United States. To date, despite some systems having operational difficulties and facing financial constraints, not a single municipal

² *Public Notice, Comment Sought on the Contribution of Federal, State, Tribal, and Local Government to Broadband, NBP Public Notice #7*, Rel. Sept. 25, 2009.

³ *In the Matters of International Comparison and Survey Requirements in the Broadband Data Improvement Act*, GN Docket No. 09-47, Rel. Mar. 31, 2009, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Rel. Apr. 8, 2009 (“*NBP Notice of Inquiry*”), and *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 09-137, Rel. Aug. 7, 2009.

⁴ Communities with municipal FTTH networks include:

SYSTEMS SERVING LARGE PERCENTAGE OF SERVICE AREA (41)		SYSTEMS SERVING LIMITED FTTH AREAS, OR JUST STARTING (16)	
Auburn IN	Jackson TN	Radium Hot Springs BC	Abingdon, VA
Barnesville MN	Kutztown PA	Reedsburg WI	Ashland, OR
Bellevue, IA	Lafayette LA	Rochelle, IL	Baldwin, WI
Bristol TN	LENOWISCKO VA	Sallisaw OK	Cedar Falls IA
Bristol VA	Lenox IA	Shawano WI	Clallum PUD WA
Brookings, SD	Loma Linda CA	Spencer IA	CMON BC
Burlington VT	Marshall MO	Tullahoma TN	Crosslake MN
Chattanooga TN	Mason County PUD WA	UTOPIA UT	Danville VA
Chelan PUD WA	Mi-Conection NC	Wilson NC	Glasgow KY
Churchill County, NV	MINET OR	Windom MN	Holland MI
Clarksville TN	Morristown TN		Ketchikan AK
Crawfordsville IN	North Kansas City MO		Monticello MN
Dalton GA	Phillipi WV		Pend Oreille PUD WA
Douglas County PUD WA	Powell WY		Sylacauga AL
Gainesville FL	Pulaski TN		Taunton MA
Grant County PUD WA	Quincy FL		Tifton GA

FTTH system has failed. One reason for this success is that, on average, the penetration rates for these municipal FTTH systems are far above industry norms, exceeding 50%.⁵

The FTTH Council has found that municipal entities complement private sector deployments. They enter when there is a larger community benefit that the private sector believes it cannot capture. The following examples demonstrate the value of these networks.

In Bristol, Virginia, the municipal utility, Bristol Virginia Utilities (BVU), first deployed a fiber-optic network in 1999 to commercial and public sector entities (such as schools and libraries) to help fuel the town's economic development and provision of services to its citizens. The decision to invest in an advanced all fiber-optic network – rather than a traditional hybrid fiber coaxial (HFC) network – was risky. The first-installed costs of an FTTH network were 15% higher than an HFC network would have been. Yet, BVU was able to offset these costs by selling a more complete set of broadband capabilities. As a result of this success, in 2001, BVU expanded its FTTH network throughout Washington County. BVU began offering the “triple-play” package over the new FTTH network in July, 2003, and, by the middle of 2004, it had a penetration rate exceeding 40%. Today, the Bristol, Virginia, network continues to build out to meet burgeoning demand, and it is viewed as a magnet for new businesses, a boon to schools permitting distance learning and other services, and a basic resource for all citizens. As a result, its cross-border sister city, Bristol, Tennessee, has deployed its own FTTH deployment in 2006.⁶

⁵ All data in this paragraph can be found in *Municipal Fiber to the Home Deployments: Next Generation Broadband as a Municipal Utility*, October, 2009, available at: http://www.ftthcouncil.org/sites/default/files/Municipal%20FTTH%20Systems%20October%202009%20Final%20Oct09_1.pdf.

⁶ For greater detail on the Bristol network, see <http://www.bbpmag.com/snapshot/snap1002.php>.

In Jackson, Tennessee, business and consumer leaders believed that private sector telecommunications and cable entities were not acting swiftly enough to offer advanced services and that this was causing Jackson to lose business opportunities to other communities. The Jackson Energy Authority (JEA), a hybrid municipal and public utility, had reached a similar conclusion, and it determined that a FTTH network could be a fundamental driver for the local economy and ensure consumers would have access to advanced data and video services. It began construction in early 2004 and had its first customers by May. The network is open to competitive providers of telecommunications and data services. Customers can receive from two competitive local exchange carriers up to four VOIP telephone lines and Internet access service at speeds ranging from 512 kbps to 10 Mbps (with the potential for 40 Mbps). From JEA, they can receive 270 all-digital channels of cable television. JEA has since greatly expanded its network, passing more than 30,000 homes and 5,000 businesses and connecting more than 16,000 and 1,200, respectively.⁷

Reedsburg is a small town (population of about 8,000) in Wisconsin. Several years ago, Reedsburg Utility Commission (a municipal utility for over 100 years) determined to deploy a FTTH network – the first in Wisconsin. The Utility initiated in 2002, began acquiring its first customers in 2003, and had over 1,000 customers by late 2004 (about a 25% penetration rate). Today, construction is complete, and the subscriber base continues to grow, passing some 4,000 premises and connecting approximately 2,700.⁸

⁷ For greater detail on the JEA network, *see* <http://www.bbpmag.com/snapshot/snap1008.php>.

⁸ For greater detail on the Reedsburg network, *see* <http://www.bbpmag.com/snapshot/snap0309.php>.

Finally, EPB, the local publicly owned utility in Chattanooga, has just begun to offer “triple-play” service over what will eventually be the largest publicly owned and operated FTTH network in the country. EPB offers broadband services at speeds ranging from 15 to 50 Mbps, which are provided symmetrically. The network, which will cost \$220 million, currently passes almost 20,000 homes and businesses, and this number will increase to more than 100,000 later in 2010 and approximately 160,000 in several years. Finally, not only will the network be used to provide traditional communications, but it will offer extensive smart electrical grid services.⁹

Despite the many benefits that can flow from municipalities being able to deploy FTTH networks, some states have prohibitions or limitations on such activities. 14 states have passed laws either prohibiting or limiting municipalities from deploying communications services. These laws take various forms. For example, Minnesota requires municipalities to get a 65 percent supermajority vote before proceeding. Texas prohibits municipalities and municipal electric utilities from providing certificated telecommunications services either directly or indirectly through public-private partnerships. Nevada flatly prohibits municipalities and counties of certain sizes from providing telecommunications services. Several other states require municipalities to impute phantom costs into their rates for the sole purpose of driving their prices up to uncompetitive levels.

Each year, additional states consider imposing barriers on municipal deployments. Even if these bills fail, they have a chilling effect on municipal deployments. Municipalities and the financial community will be reluctant to make significant investments in advanced communications networks if they are concerned that state laws may undercut these investments.

⁹ For greater detail on the Chattanooga network, *see* <http://www.muninetworks.org/content/chattanooga-launches-nations-largest-public-full->
...*Continued*

In enacting the Telecommunications Act of 1996, Congress sought to advance its pro-competition policy by ensuring that “any entity” could enter to provide telecommunications services. Section 253 of the Act implements this policy by prohibiting a state or locality from enacting a law or regulation that would have the effect of barring such entry, and it gives the Federal Communications Commission (FCC) the ability to preempt such actions. Unfortunately, in 2004, in *Nixon V. Missouri Municipal League*,¹⁰ the U.S. Supreme Court held that Congress had not spoken emphatically enough in Section 253 to meet the high standard that the Court employs in construing federal statutes that are said to preempt traditional state powers.

Significantly, the Court went on to state that it was not deciding the merits of municipal entry and that the municipalities had “at the very least a respectable position, that fencing governmental entities out of the telecommunications business flouts the public interest.” The Court also noted that the FCC had “denounced the policy behind the Missouri statute;” that two of the commissioners had “minced no words in saying that participation of municipal entities in the telecommunications business would ‘further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small and rural communities in which municipally-owned electric utilities have great competitive potential;” and that a third commissioner had underscored that “barring municipalities from providing telecommunications substantially disserved the policy behind the Telecommunications Act.”¹¹

The FTTH Council has called for Congress to remedy this problem. In previous Congresses, Senators Lautenberg and McCain and Representatives Boucher, Upton, and Markey

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¹⁰ 541 U.S.125, 155 S.Ct. 1555.

¹¹ 541 U.S. 130-131, 155 S.Ct. 1560-1561.

have introduced legislation¹² that specifically provides that the FCC shall preempt state laws that prohibit or effectively prohibit municipal entities from providing telecommunications services. In making recommendations in the National Broadband Plan, the FTTH Council urges the Commission to propose to Congress that it consider and enact such legislation so that municipalities can participate in accelerating the deployment of FTTH networks.

Respectfully submitted,



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¹² See, e.g. S. 1853, Community Broadband Act of 2007, introduced by Senators Lautenberg and Smith, and H.R. 3281, Community Broadband Act of 2007, introduced by Representatives Boucher and Upton.